IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-32023

LANDOAK CAPITAL, LLC

Debtor

NOTICE OF APPEAL FILED:	November 26, 2001
DISTRICT COURT NO.:	3:02-cv-15
DISPOSITION:	February 12, 2002 Judge James Jarvis granted movant's motion to dismiss the appeal.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

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LANDOAK CAPITAL, LLC

Debtor

MEMORANDUM ON OBJECTION TO DEBTOR'S PROPOSED PLAN OF REORGANIZATION

APPEARANCES: HAGOOD, TARPY & COX, PLLC
Lynn Tarpy, Esq.
900 South Gay Street
Suite 2100
Knoxville, Tennessee 37902
Attorneys for Debtor

WAGNER, MYERS & SANGER, P.C.
Martin B. Bailey, Esq.
1801 First Tennessee Plaza
Knoxville, Tennessee 37929
Attorneys for Robert W. Holt, Julia Pearson, Melissa Pearson, Dora Flanary, Jackie S. Wilson, Judy Wilson, and Diane S. McKamey

ELLEN B. VERGOS, ESQ.
UNITED STATES TRUSTEE
Patricia C. Foster, Esq.
Suite 114, Howard H. Baker, Jr. United States Courthouse
800 Market Street
Knoxville, Tennessee 37902
Attorney for United States Trustee

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Before the court is the Plan of Reorganization (Plan) filed by the Debtor on July 11, 2001, and the Objection to Debtor's Proposed Plan of Reorganization (Objection) filed on September 25, 2001, by seven Class 2 nonpriority unsecured creditors, Robert W. Holt, Julia Pearson, Melissa Pearson, Dora Flanary, Jackie S. Wilson, Judy Wilson, and Diane S. McKamey (collectively ?the Creditors"). The Creditors object to confirmation of the Debtor's proposed Plan pursuant to 11 U.S.C.A. § 1129(a)(7)(A) (West 1993). A confirmation hearing was held on November 14, 2001. The record before the court consists of the testimony of one of the Debtor's principals, Patrick L. Martin, and three exhibits introduced into evidence.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(L) (West 1993).

I

Robert W. Holt, individually, filed an Involuntary Chapter 7 Petition against the Debtor on April 23, 2001. On motion of the Debtor, without opposition from the petitioning creditor, an Order for Relief was subsequently entered under Chapter 11 on June 12, 2001.

The nature of the Debtor's business and the circumstances leading up to its bankruptcy were testified to generally by Mr. Martin but are best described in the Debtor's Second Amended Disclosure Statement filed August 21, 2001, as follows:[1]

> The Debtor is a Tennessee limited liability company created to be an investment vehicle deriving its income from the revenues generated by the leasing of vehicles through LandOak Leasing, LLC, to which it loaned the investment proceeds, and

[1] The Second Amended Disclosure Statement was not introduced into evidence at the confirmation hearing. The court, however, takes judicial notice of this document and of the representations made therein by the Debtor. *See* FED. R. EVID. 201.

> leases brokered through Cherokee Rental, Inc. The loan was effected by LandOak Leasing signing a $10,000,000.00 revolving note with the debtor. The members of the debtor company are LandOak Management, LLC, which owns 98%, Pat Martin who owns 1%, and Mike Atkins who owns 1%. These members also own LandOak Leasing in the same percentage as the ownership of the debtor. All creditors have previously received a Confidential Private Placement Memorandum dated April 28, 1999, upon which they based their investment decision. . . .
>
> Because of the difficulties encountered in the leasing business, the revenue stream of the company evaporated. The debtor undertook an extensive investigation of what caused the income to stop by hiring Sterling Owen IV. This investigation revealed that the principal of Cherokee Rental, Inc., had put in motion a *Ponzi* scheme using fraudulent vehicle leases. This has been reported by the principals of the debtor to the FBI which is conducting its own investigation. Upon discovering what had occurred, the principals of the debtor formed The LandOak Company, LLC, to consolidate the leasing businesses owned by Cherokee Rental, Inc., BFM Leasing, LLC, and LandOak Leasing, LLC. LandOak Company then put out a Confidential Private Placement Memorandum dated April 24, 2000, upon which the investors in the debtor swapped their interests for notes from LandOak Company. . . .
>
> By September 2000 it was apparent that the fraud of Cherokee Rental, Inc., and its principal, Jeff Coppinger, had more seriously impaired the value of the creditors' investment than originally thought. As a result, the debtor and LandOak Company prepared and sent to all of the creditors an Exchange Offer and Release Solicitation Statement dated September 29, 2000. . . . The Offer proposed and instituted an exchange of the senior notes held by the creditors for junior notes and the release from liability of the debtor and other persons and entities . . . . All but about six (6) creditors accepted the exchange. After the exchange, LandOak Company exchanged its assets (which secure the note to the debtor) for 8,000,000 shares of unregistered, restricted stock of Tice Technology, Inc. The stock was trading for approximately $.18 per share the last week of June 2001[.]

According to Mr. Martin's testimony and the Second Amended Disclosure Statement, the Debtor's only asset is the $10,000,000.00 revolving note of LandOak Company.

The Debtor's Plan provides for two classes of creditors. Class 1 consists of the $15,000.00 secured claim of Martin and Atkins, the Debtor's principals. Class 2 consists of the Debtor's nonpriority unsecured creditors, including the Creditors.

The Plan proposes to distribute 2,964,652 of LandOak Company's 8,000,000 shares of Tice Technology, Inc. (Tice) stock. The stock is to be distributed first to the Class 1 creditors to pay their claim in full. All remaining shares will be distributed pro rata to Class 2 creditors. According to the Summary of Ballots filed by the Debtor on October 2, 2001, 35 out of 41 Class 2 ballots voted to accept the Plan.

The Creditors' Objection to the Plan is twofold. First, they contend that the Plan fails to adequately marshal the Debtor's only asset—the $10,000,000.00 revolving note owed by LandOak Company. Specifically, the Creditors state that the Plan should distribute a greater amount of Tice stock.[2] Secondly, the Creditors object that the Plan provides for no attempted recovery from Cherokee Rental, Inc. (Cherokee) and Jeff Coppinger (Coppinger) for the funds allegedly misappropriated.[3]

II

Section 1129(a) of the Bankruptcy Code sets forth thirteen requirements that must be met for consensual plan confirmation. At issue in the present case is § 1129(a)(7)(A), which provides in pertinent part:

(7) With respect to each impaired[4] class of claims or interests—

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[2] According to the Debtor, the remaining 5,035,348 shares of LandOak Company's Tice stock will be distributed to other creditors of LandOak Company **?**from other investment vehicles affected by the *Ponzi* scheme of Coppinger."

[3] Mr. Martin testified that its investigator, Sterling Owen, IV, reported that there was little or no potential for recovery from Cherokee or Coppinger.

[4] It is undisputed that Class 2 is an impaired class.

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date[.]

11 U.S.C.A. § 1129(a)(7)(A) (West 1993). Because the Plan does not have the unanimous approval of Class 2, § 1129(a)(7)(A)(ii) must be satisfied for the Plan to be confirmed.[5]

The Debtor bears the burden of proving that its Plan meets each of the § 1129(a) confirmation requirements. *See In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 532 (Bankr. E.D. Tenn. 1997). Under § 1129(a)(7)(A)(ii), the Debtor must show that its Plan provides the members of Class 2 with a distribution that is not less than what those creditors would receive under Chapter 7.

The Debtor has failed to meet this burden. The only proof offered at the confirmation hearing was the testimony of Patrick Martin, who stated that LandOak Company's remaining 5,035,348 shares of Tice stock are necessary for distribution to other creditors of that entity and that it is pointless to pursue recovery from Cherokee and Coppinger. The Debtor offered no other evidence to substantiate that the Plan offers at least as much to the Class 2 creditors as could be

[5] At the confirmation hearing, counsel for the Creditors raised for the first time the issue of whether the majority of Class 2 creditors were in fact creditors of LandOak Company rather than creditors of the Debtor and therefore not entitled to vote on the Plan. The court need not address this issue as it is not necessary to the disposition of the Creditors' Objection.

recovered for them from LandOak Company, Cherokee, and Coppinger by a Chapter 7 trustee.

The court is perplexed by the absence of proof relating to potential recovery from Cherokee and Coppinger. Moreover, that the business entities central to the Plan—namely the Debtor, LandOak Company, and Tice—are all controlled by Martin and Atkins, who are also major creditors of LandOak Company, raises significant questions of conflict of interest.

The Bankruptcy Code authorizes the court to order the appointment of a Chapter 11 trustee for reasons including "cause" or "if such appointment is in the interest of creditors." 11 U.S.C.A. § 1104(a)(1)-(2) (West 1993). Although § 1104 expressly permits such appointment only "on request of a party in interest or the United States trustee," it is recognized that courts may *sua sponte* raise the issue of whether a Chapter 11 trustee should be appointed. *See, e.g., In re Mother Hubbard, Inc.*, 152 B.R. 189, 196-97 (Bankr. W.D. Mich. 1993); 7 KING, COLLIER ON BANKRUPTCY ¶ 1104.02[2][b], at 1104-7 (15th ed. rev. 2001). Where the record indicates the existence of cause, "it is proper for the court to raise the issue and allow interested parties to appear and be heard." *Mother Hubbard*, 152 B.R. at 197. Additionally, the court may also *sua sponte* raise the issue of conversion to Chapter 7. *See, In re Great Am. Pyramid Joint Venture*, 144 B.R. 780, 789 (Bankr. W.D. Tenn. 1992).

The court finds that the Debtor has not met its burden of proof regarding the § 1129(a)(7) confirmation requirement. Additionally, the court is persuaded that the conflicting interests of Martin and Atkins require the appointment of a Chapter 11 trustee or conversion to Chapter 7.

To that end, the court will fix a hearing date by which the Debtor will be required to show cause why such additional relief should not be granted.

An Order consistent with this Memorandum will be entered.

FILED: November 16, 2001

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-32023

LANDOAK CAPITAL, LLC

Debtor

O R D E R

For the reasons stated in the Memorandum on Objection to Debtor's Proposed Plan of Reorganization filed this date, the court directs the following:

1. The Objection to Debtor's Proposed Plan of Reorganization filed September 25, 2001, by Robert W. Holt, Julia Pearson, Melissa Pearson, Dora Flanary, Jackie S. Wilson, Judy Wilson, and Diane S. McKamey, is SUSTAINED. Confirmation of the Debtor's Plan of Reorganization filed July 11, 2001, is accordingly DENIED.

2. The Debtor will appear before the court on December 6, 2001, at 11:00 a.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee, to show cause why the court should not, pursuant to 11 U.S.C.A. § 105(a) (West 1993), *sua sponte* order the appointment of a trustee pursuant to 11 U.S.C.A. § 1104(a) (West 1993) or convert the Debtor's Chapter 11 case to Chapter 7 pursuant to 11 U.S.C.A. § 1112(b) (West 1993 & Supp. 2001), whichever is in the best interest of creditors.

SO ORDERED.

ENTER: November 16, 2001

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE